Malaysia Resources Corp Bhd v Desaru Peace Holdings Club Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-22–04 OF 2022
ONG CHEE KWAN J
9 DECEMBER 2022

Arbitration — Interim measures — Application for — Plaintiff applied to High Court for interim measures — Whether court and arbitral tribunal had concurrent jurisdiction to grant interim measures — Whether application ought to be brought for determination before arbitral tribunal instead of court — Whether estoppel applied — Arbitration Act 2005 ss 11(1) & 19(1)

Through a letter of award ('LOA'), the plaintiff was appointed as the main contractor for a project ('the project') for a contract sum of RM141m. Vide a novation agreement, the LOA was novated to the defendant. However, during the project, various disputes arose between the plaintiff and the defendant. The plaintiff commenced three adjudication proceedings against the defendant in respect of the project, two of which were rendered in its favour while the other adjudication claim was dismissed ('the adjudication awards'). The plaintiff and the defendant executed a dispute resolution agreement ('DRA') to, inter alia, stay all the adjudication awards, withdraw all enforcement and setting aside applications and appeal and to refer all their disputes to arbitration. Pursuant to the DRA, the parties proceeded to have their disputes determined by arbitration. As a result, an arbitral tribunal of three arbitrators was constituted ('the arbitral tribunal') and the parties exchanged their respective pleadings in the arbitration proceedings. The defendant had also filed a counterclaim in the sum of RM51,719,778.69 against the plaintiff. The plaintiff wrote to the defendant requesting, inter alia, for security for costs on the ground that 'there is a real and credible risk that the claimant would be unable to recover any costs and expenses in successfully defending the counterclaim'. The defendant rejected the plaintiff's request for security for costs. The plaintiff once again wrote to the defendant which contained two requests: (a) security for costs; and (b) an enquiry whether the defendant would have any objection to the application for security for costs being made before the arbitral tribunal. The plaintiff's request for security for costs was again refused unequivocally. As regards the request to refer the application for security for costs being made before the arbitral tribunal, the defendant did not provide a direct response save that the defendant reserved all its rights to fully ventilate the matters 'in the appropriate forum'. The plaintiff filed this originating summons ('encl 1') for this court to determine the application for security for costs ('the application') under s 11(1) of the Arbitration Act 2005 ('the AA'). Subsequent to the filing

of encl 1, no objections were raised that the application for the security for costs ought to be brought before the arbitral tribunal instead of the court. The plaintiff submitted that: (i) the court had concurrent/co-extensive jurisdiction and parties had complete freedom of choice to choose its preferred forum; (ii) the non-consent by the defendant to its request to bring the application before the arbitral tribunal meant that the plaintiff could now file the application to the court as the parties had 'otherwise agreed' under s 19(1) of the AA; and (iii) the defendant was estopped from objecting to the court's jurisdiction to hear the application in encl 1 for failing to raise any objections. The defendant on the other hand submitted that: (1) there was no agreement reached under s 19(1) of the AA between the defendant and the plaintiff. Thus, the default position stipulated in s 19(1) of the AA should continue to apply, namely, the application should be made to the arbitral tribunal; (2) because the court's power to grant interim measures was a statutory power, the requirement of the statute must be strictly complied with before the power could be invoked; and (3) there could be no estoppel against the statute.

Held, dismissing the application:

(1) Parties to the arbitration could agree to exclude the jurisdiction of the arbitral tribunal to grant interim measures and instead leaving it exclusively to the courts to order such measures ('exclusion agreement'). If there was no exclusion agreement, both the arbitral tribunal and the court would have concurrent jurisdiction to grant interim measures in respect of the arbitration proceedings. In the exercise of the concurrent jurisdiction, it would be wholly inconsistent with the fundamental principles of party autonomy and minimal judicial intervention if the court were to adopt a 'complete freedom of choice' approach (see paras 43–45).

(2) Section 8 of the AA restricted the courts' role only to such matters as are expressly and specifically provided in the AA. Party autonomy was given precedence over court intervention in arbitration. It was only natural that when parties agreed to have their disputes to be determined by an arbitral tribunal, all applications including application seeking interim measures relating to their disputes ought to be made before the said tribunal. Thus, even though the arbitral tribunal was not the only forum that was empowered to grant interim measures in connection with the arbitral proceedings because the AA conferred on the court concurrent jurisdiction to entertain and grant interim measures as well, it did not mean that a party had a free choice to file the application for interim measures in either the courts or before the arbitral tribunal (see paras 47–49).

(3) Simply because the defendant had not provided express consent to have the arbitral tribunal determine the application, this itself could not be

equated to mean that there was an agreement by the parties to exclude the jurisdiction of the arbitral tribunal and for the plaintiff to apply to court for the security for costs. The non-agreement between the parties could not amount to the existence of an excluded agreement under s 19(1) of the AA. The phrase '[U]nless otherwise agreed by the parties' in s 19(1) of the AA meant that the parties to the arbitration proceedings must reach a *consensus ad idem* or a positive agreement that the application for interim measures for the arbitration proceedings would be made to the courts instead of the arbitral tribunal. There was no agreement in this case between the plaintiff and the defendant for the application to be brought for determination to the court instead of to the arbitral tribunal (see paras 74 & 78–79).

(4) The issue before this court related to the resolution of the tension between the arbitral tribunal and the court arising from the concurrent jurisdiction vested in both bodies to order interim measures in relation to an arbitration proceeding. The court was and could not be affected by any issue of estoppel that may be raised between the parties especially since in the present case, it was not the jurisdiction of the court that was put in dispute but the exercise of the court's discretion. Hence, the issue of estoppel raised by the plaintiff against the defendant for taking an inconsistent step in this proceeding had no bearing on the court's exercise of its discretion to refrain from intervening in the arbitral process and not to take out of the hands of the arbitrators the power of decision which the parties had entrusted to them alone. The estoppel between the parties could not be applied to tie the hands of the court resulting in the court encroaching on the arbitral tribunal's jurisdiction, which was inconsistent with the underlying policy of the AA (see paras 84–86).

[Bahasa Malaysia summary

Melalui satu surat penganugerahan ('SP'), plaintif dilantik sebagai kontraktor utama bagi satu projek ('projek') dengan jumlah kontrak RM141 juta. Melalui satu perjanjian novasi, SP telah diserahkan kepada defendan. Walau bagaimanapun, semasa projek dijalankan, pelbagai pertikaian timbul antara plaintif dan defendan. Plaintif memulakan tiga prosiding adjudikasi terhadap defendan berkenaan dengan projek itu, dua daripadanya telah berpihak kepadanya manakala tuntutan adjudikasi yang lain telah ditolak ('award adjudikasi'). Plaintif dan defendan melaksanakan perjanjian penyelesaian pertikaian ('PPP') untuk, antara lain, menangguhkan semua award adjudikasi, menarik balik semua penguatkuasaan dan mengetepikan permohonan dan rayuan serta merujuk semua pertikaian mereka kepada timbang tara. Menurut PPP, pihak-pihak meneruskan pertikaian mereka ditentukan melalui timbang tara. Akibatnya, tribunal timbang tara yang terdiri daripada tiga penimbang tara telah ditubuhkan ('tribunal timbang tara') dan pihak-pihak bertukar pliding masing-masing dalam prosiding timbang tara. Defendan juga telah

memfailkan tuntutan balas berjumlah RM51,719,778.69 terhadap plaintif. Plaintif menulis surat kepada defendan meminta, antara lain, untuk jaminan kos atas alasan bahawa 'terdapat risiko sebenar dan boleh dipercayai bahawa pihak yang menuntut tidak akan dapat mendapatkan semula sebarang kos dan perbelanjaan dalam berjaya mempertahankan tuntutan balas'. Defendan menolak permintaan plaintif untuk jaminan kos. Plaintif sekali lagi menulis kepada defendan yang mengandungi dua permintaan: (a) jaminan untuk kos; dan (b) pertanyaan sama ada defendan akan mempunyai sebarang bantahan terhadap permohonan jaminan kos yang dibuat di hadapan tribunal timbang tara. Permintaan plaintif untuk jaminan kos sekali lagi ditolak dengan jelas. Berkenaan dengan permintaan untuk merujuk permohonan jaminan kos dibuat di hadapan tribunal timbang tara, defendan tidak memberikan jawapan secara langsung kecuali defendan menyimpan semua haknya untuk mengudarakan sepenuhnya perkara itu 'dalam forum yang sesuai'. Plaintif memfailkan saman pemula ini ('lampiran 1') untuk mahkamah ini menentukan permohonan jaminan kos ('permohonan') di bawah s 11(1) Akta Timbang Tara 2005 ('ATT'). Selepas pemfailan lampiran 1, tiada bantahan dibangkitkan bahawa permohonan jaminan kos perlu dibawa ke tribunal timbang tara dan bukannya mahkamah. Plaintif berhujah bahawa: (i) mahkamah mempunyai bidang kuasa serentak/bersama dan pihak-pihak mempunyai kebebasan pilihan sepenuhnya untuk memilih forum pilihannya; (ii) ketidaksetujuan defendan terhadap permintaannya untuk membawa permohonan itu ke tribunal timbang tara bermakna plaintif kini boleh memfailkan permohonan itu kepada mahkamah kerana pihak-pihak telah 'dipersetujui selainnya' di bawah s 19(1) ATT; dan (iii) defendan telah dihalang daripada membantah bidang kuasa mahkamah untuk mendengar permohonan dalam lampiran 1 kerana gagal mengemukakan sebarang bantahan. Defendan sebaliknya berhujah bahawa: (1) tiada persetujuan dicapai di bawah s 19(1) ATT antara defendan dan plaintif. Oleh itu, kedudukan ingkar yang ditetapkan dalam s 19(1) ATT hendaklah terus terpakai, iaitu, permohonan hendaklah dibuat kepada tribunal timbang tara; (2) kerana kuasa mahkamah untuk memberikan langkah interim adalah kuasa berkanun, keperluan statut itu mesti dipatuhi dengan ketat sebelum kuasa itu boleh digunakan; dan (3) tidak boleh ada estoppel terhadap statut itu.

Diputuskan, menolak permohonan:

(1) Pihak kepada timbang tara boleh bersetuju untuk mengecualikan bidang kuasa tribunal timbang tara untuk memberikan langkah interim dan sebaliknya menyerahkannya secara eksklusif kepada mahkamah untuk memerintahkan langkah tersebut ('perjanjian pengecualian'). Jika tidak ada perjanjian pengecualian, kedua-dua tribunal timbang tara dan mahkamah akan mempunyai bidang kuasa serentak untuk memberikan langkah interim berkenaan dengan prosiding timbang tara. Dalam melaksanakan bidang kuasa serentak, ia akan menjadi tidak konsisten

sepenuhnya dengan prinsip asas autonomi pihak dan campur tangan kehakiman yang minimum jika mahkamah menggunakan pendekatan 'kebebasan memilih sepenuhnya' (lihat perenggan 43–45).

(2) Seksyen 8 ATT mengehadkan peranan mahkamah hanya kepada perkara-perkara seperti yang diperuntukkan secara nyata dan khusus dalam ATT. Autonomi pihak diberi keutamaan berbanding campur tangan mahkamah dalam timbang tara. Adalah wajar apabila pihak-pihak bersetuju supaya pertikaian mereka diputuskan oleh tribunal timbang tara, semua permohonan termasuk permohonan untuk mendapatkan langkah interim yang berkaitan dengan pertikaian mereka hendaklah dibuat di hadapan tribunal tersebut. Oleh itu, walaupun tribunal timbang tara bukan satu-satunya forum yang diberi kuasa untuk memberikan langkah interim berkaitan dengan prosiding timbang tara kerana ATT memberikan bidang kuasa serentak mahkamah untuk melayan dan memberikan langkah interim juga, ia tidak bermakna satu pihak mempunyai pilihan bebas untuk memfailkan permohonan bagi langkah interim sama ada di mahkamah atau di hadapan tribunal timbang tara (lihat perenggan 47–49).

(3) Hanya kerana defendan tidak memberikan persetujuan nyata untuk tribunal timbang tara menentukan permohonan itu, ini sendiri tidak boleh disamakan dengan bermakna bahawa terdapat persetujuan oleh pihak-pihak untuk mengecualikan bidang kuasa tribunal timbang tara dan untuk plaintif untuk memohon kepada mahkamah untuk jaminan kos. Ketidaksepakatan antara pihak-pihak tidak boleh dianggap sebagai kewujudan perjanjian yang dikecualikan di bawah s 19(1) ATT. Frasa '[M]elainkan jika dipersetujui selainnya oleh pihak-pihak' dalam s 19(1) ATT bermaksud bahawa pihak-pihak dalam prosiding timbang tara mesti mencapai *consensus ad idem* atau persetujuan positif bahawa permohonan untuk langkah-langkah interim untuk prosiding timbang tara akan dibuat kepada mahkamah dan bukannya tribunal timbang tara. Tiada persetujuan dalam kes ini antara plaintif dan defendan untuk permohonan dibawa untuk penentuan ke mahkamah dan bukannya ke tribunal timbang tara (lihat perenggan 74 & 78–79).

(4) Isu di hadapan mahkamah ini berkaitan dengan penyelesaian ketegangan antara tribunal timbang tara dan mahkamah yang timbul daripada bidang kuasa serentak yang terletak hak pada kedua-dua badan untuk memerintahkan langkah interim berhubung dengan prosiding timbang tara. Mahkamah telah dan tidak boleh terjejas oleh sebarang isu estoppel yang mungkin dibangkitkan antara pihak-pihak terutamanya memandangkan dalam kes ini, bukan bidang kuasa mahkamah yang dipertikaikan tetapi penggunaan budi bicara mahkamah. Oleh itu, isu estoppel yang dibangkitkan oleh plaintif terhadap defendan kerana mengambil langkah yang tidak konsisten dalam prosiding ini tidak

A mempunyai kaitan dengan penggunaan budi bicara mahkamah untuk mengelak daripada campur tangan dalam proses timbang tara dan tidak mengambil alih daripada tangan penimbang tara kuasa keputusan yang telah diamanahkan oleh pihak-pihak kepada mereka sahaja. Estoppel antara pihak tidak boleh digunakan untuk mengikat tangan mahkamah yang mengakibatkan mahkamah menceroboh bidang kuasa tribunal timbang tara, yang tidak konsisten dengan dasar asas ATT (lihat perenggan 84–86).]

Cases referred to

C *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450, FC (distd)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, HL (refd)

D *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16, CA (refd)

Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action [2010] MLJU 2140, HC (folld)

Cowlin Construction Ltd v CFW Architects (A Firm) [2002] EWHC 2914 E (TCC), QBD (refd)

Express Newspapers plc v News (UK) Ltd and others [1990] 3 All ER 376, Ch D (refd)

Jiwa Harmoni Offshore Sdn Bhd v ISHI Poawer Sdn Bhd [2009] 1 LNS 849, HC (refd)

F *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23, FC (distd)

Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd [2014] MLJU 1860; [2014] 3 CLJ 915, HC (not folld)

NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] SGCA 5, G CA (refd)

P&A Management Sdn Bhd v WSH Development Sdn Bhd [2022] MLJU 825, HC (distd)

Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf) [2010] 2 MLJ 713, FC (distd)

H *Regina v Secretary of State for the Home Department, Ex Parte Jeyeanthan; Ravichandran v Secretary of State for The Home Department* [2000] 1 WLR 354, CA (distd)

Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor [2016] 5 MLJ 1, FC I (refd)

Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor [2011] 1 MLJ 752, CA (refd)

United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 11, 11(1), 19, 19(1)
International Arbitration Act 1994 [SG] ss 12(1), (7), 12A, 12A(4), (5), (6)
Arbitration Act 1950 [UK] s 12(6)

Cecil Abraham (with Sunil Abraham) (Cecil Abraham & Partners) for the plaintiff.
Rajendra Navaratnam (with Raja Kumar Raja Kandan, Koh Yi Ting and Ng Chu Yin) (Azman Davidson & Co) for the defendant

Ong Chee Kwan J:

INTRODUCTION

[1] Where parties have chosen arbitration as their preferred dispute resolution mechanism, should an application for interim measures in relation to the arbitration proceedings be determined by the arbitral tribunal or by the courts or does it depend on the particular circumstances of the case? Does the existence of concurrent jurisdiction of the courts and arbitral tribunals to order interim measures mean that a party is at liberty to choose the forum of their choice when making an application for interim measures? When, if at all, can the jurisdiction of the arbitral tribunal to grant interim measures be excluded? These are the questions dealt with in this judgment.

BACKGROUND FACTS

[2] The plaintiff, Malaysian Resources Corp Bhd ('MRCB'), is a public limited company and is principally an investment holding company. It further engages in construction related activities, environmental engineering, property development, property investment and the provision of management services to its subsidiaries.

[3] The defendant, Desaru Peace Holdings Club Sdn Bhd ('DPHC'), is a private limited company. DPHC is the owner of a luxury branded resort known as One & Only Desaru Coast, formerly known as the Aman Desaru Resort.

[4] Through a letter of award dated 28 October 2014 ('the LOA'), the plaintiff was appointed as the main contractor by DPHC for a project known as 'The Proposed Construction and Completion of Central Facilities, Conference Centre, SPA, Carpark with M&E Rooms and Back of House Facilities and Related Supporting Facilities (Exclude Structural Works), 46 Units of Club Suite (Exclude Structural Works), 2 Units of Prototype Villa (Exclude Structural Works), 1 No of Beach Club, 1 No of Recreation Club, 1

No of Remote Back of House and Overall Infrastructure Works on Part of PTD 2486 (LOT 2238), PTD 1412 (LOT 1624), PTD 1413 (LOT 1635) and Part of PTD 2460, Mukim Pantai Timur, Daerah Kota Tinggi, Johor Darul Takzim' ('the project') for a contract sum of RM141m.

[5] The plaintiff was awarded the LOA to replace the previous main contractor for the project, one Al Ambia Sdn Bhd.

[6] Vide a novation agreement dated 9 November 2015, the LOA was novated to the defendant, a sister company of Desaru Peace Holdings Villa Sdn Bhd.

[7] However, during the currency of the project, various disputes arose between the plaintiff and the defendant.

[8] The plaintiff commenced three adjudication proceedings against the defendant in respect of the project, two of which were rendered in its favour. The other adjudication claim filed by the plaintiff was dismissed. The summary of the adjudication proceedings is as follows:

(a) the first adjudication proceeding was found in favour of the plaintiff ('the first adjudication'). The defendant applied to the High Court to set aside and or stay the award under the first adjudication. The High Court allowed the same. The plaintiff then appealed against the High Court's decision to the Court of Appeal;

(b) the second adjudication proceeding was found in favour of the defendant ('the second adjudication'). The plaintiff had applied to the High Court to set aside the award under the second adjudication; and

(c) the third adjudication proceeding was found in favour of the plaintiff ('the third adjudication'). The defendant had applied to the High Court to set aside and or stay the award under the third adjudication.

(collectively 'the adjudication awards').

[9] On 3 December 2019, the plaintiff and the defendant executed a dispute resolution agreement ('DRA') to, inter alia, stay all the adjudication awards, withdraw all enforcement and setting aside applications and appeal and to refer all their disputes to arbitration.

[10] Pursuant to the DRA, the parties proceeded to have their disputes determined by arbitration. As a result, an arbitral tribunal of three arbitrators was constituted ('the arbitral tribunal').

[11] Between 3 September 2021 to 28 January 2022, the parties exchanged their respective pleadings in the arbitration proceedings. For our present purposes, it is to be noted that the defendant had filed a counterclaim in the sum of RM51,719,778.69 against the plaintiff.

[12] The arbitral tribunal thereafter fixed the evidential hearings on 11 October 2022 to 14 October 2022, 17 October 2022 to 21 October 2022, 26 October 2022 to 27 October 2022, 14 November 2022 to 18 November 2022 and 21 November 2022 to 24 November 2022.

REQUEST FOR SECURITY FOR COSTS

[13] On 10 January 2022, the plaintiff wrote to the defendant's solicitors requesting, inter alia, for security for costs ('the first letter') on the ground that 'there is a real and credible risk that the Claimant will be unable to recover any costs and expenses in successfully defending the Counterclaim'. A sum of RM8.8m was sought as security for costs. The relevant parts of the letter are reproduced below:

> 4. In the circumstances, given the Counterclaim filed by the Respondent wherein liquidated damages, costs of defects and rectification as well as additional loss and expenses in the sum of RM51.719,778.69 is sought along with damages and other costs, it is only proper that the Respondent provide security for costs as there is a real and credible risk that the Claimant will be unable to recover any costs and expenses in successfully defending the said Counterclaim, owing to the Respondent's impecuniosity as well as that of its intermediate holding company and ultimate holding companies.
>
> 5. As such, we are instructed by the Claimant to request that the Respondent provide security for costs in respect of the Counterclaim in the sum of RM8.8m within fourteen (14) days from the date of this letter. The said sum is to be paid into a joint stakeholders account in the name of the solicitors representing both parties in this pending arbitration.

[14] On 17 January 2022, the defendant's solicitors gave notice of the defendant's rejection of the plaintiff's request for security for costs ('first reply').

[15] On 31 January 2022, the plaintiff's solicitors once again wrote to the defendant's solicitors ('the second letter'). The second letter contains, inter alia, two requests:

(a) security for costs; and

(b) an enquiry whether the defendant would have any objection to the application for security for costs being made before the arbitral tribunal.

The relevant part of the letter is reproduced below:

> 5. Given that the Respondent has refused to provide any security for costs whatsoever in respect of the Respondent's Counterclaim, kindly take note that the Claimant has no alternative but to take appropriate steps to make the necessary application for security for costs.
>
> ...
>
> 8. Should however, the Respondent be disinclined to change its position, we seek confirmation as to whether the Respondent agrees to the application for security for costs, in particular, being made before the arbitral tribunal.
>
> 9. We invite the Respondent to revert with its final position within seven (7) days from the date of this letter, failing which the Claimant will be constrained to take such action as is necessary us provided for by law.

[16] On 10 February 2022, the defendant's solicitor replied to the second letter ('the second reply'). The plaintiff's request for security for cost was again refused unequivocally. As regards the request to refer the application for security for cost being made before the arbitral tribunal, the defendant did not provide a direct response save that the defendant reserved all its rights to fully ventilate the matters 'in the appropriate forum'. The relevant parts of the letter are reproduced below:

> 2. In response thereto, we have our client's instructions to state that our position taken in our letter dated 17.1.2022 remains and your allegations vide your letter dated 31.11.2022 are vehemently denied.
>
> ...
>
> 4. As the parties are in arbitration, we do not propose to respond and further debate on these matters by way of correspondence and will reserve our rights to fully ventilate them in the appropriate forum.
>
> 5. Should your client insist in pursuing with this or any application arising from the matters set out here, our client is prepared to defend the same and will not hesitate to seek for costs against you client on a solicitor-client basis.

[17] On 1 April 2022, the plaintiff filed the present originating summons ('encl 1') for this court to determine the application for security for costs ('the application') under s 11(1) of the Arbitration Act 2005 ('the AA 2005').

[18] Whilst the application was pending before the court, the parties also exchanged emails with the arbitral tribunal on the application. More specifically, on 12 April 2022, the plaintiff's solicitors informed the arbitral tribunal that the application has been filed before the High Court of Malaya, Kuala Lumpur and that the same has been fixed for hearing on 17 August 2022. The arbitral tribunal was further informed that:

> prior to the filing of the application for Security for Costs, the Claimant had specifically requested if the Respondent would have any objection to the application for Security for Costs being made before this arbitral tribunal in accordance with s

19 of the Arbitration Act 2005. *The Respondent did not respond and/or expressly agree to the application for Security for Costs being made before the arbitral tribunal. As such, in the absence of the Respondent's consent, the Claimant proceeded to file the application for Security for Costs before the High Court of Malaya at Kuala Lumpur in accordance with the requirements of* section 11 of the Arbitration Act 2005. (Emphasis added.)

[19] On the same day ie 12 April 2022, the arbitral tribunal issued an email acknowledging the application and queried if the defendant had any comments in this regard. The defendant's solicitors responded on 12 April 2022 that the defendant 'mostly certainly has comments on the matter' and requested for two days to revert to the arbitral tribunal as they were engaged in the Court of Appeal.

[20] On 13 April 2022, the defendant's solicitors issued an email stating, inter alia, that:

... We confirm that an application for Security for Costs ('said application') was in fact filed before the High Court of Kuala Lumpur — the cause papers for which was served on us on 4 April 2022.

We note that an application under s 19 of the Arbitration Act 2005 may be made at the request of a party without the need to obtain the agreement of the other party to the arbitration. *Be that as it may, whilst there was no express response to the Claimant's request to refer the said application to this Tribunal, the Respondent has never objected to the said application being made to this Tribunal. In fact, we have expressly informed the Claimant that the Respondent is prepared to fully ventilate the said application in the appropriate forum.*

The Claimant has now opted to refer the said application to the High Court of Kuala Lumpur for which we will attend to accordingly. (Emphasis added.)

[21] On 15 April 2022, the plaintiff's solicitors issued an email to the arbitral tribunal to express its disagreement with the contentions made by the defendant's solicitors and stated , inter alia, that:

...

6. In the context of the present arbitration, it is pertinent to note that the Claimant had *specifically requested* if the Respondent would have any objection to the application for Security for Costs being made before this arbitral tribunal in accordance with s 19 of the Arbitration Act 2005 wherein as *acknowledged by the Respondent by way of its representative's email dated 13 April 2022 below — 'there was no express response to the Claimant's request to refer the said application to this Tribunal'*. As such the Respondent's current contention that it never objected to the said application for Security for Costs being made before this arbitral tribunal is *not quite correct and/or accurate*.

7. *The Claimant has therefore been compelled to file the application for Security for Costs before the High Court of Malaya at Kuala Lumpur in accordance with the requirements of* section 11 of the Arbitration Act 2005 .... (Emphasis added.)

[22] On the same day, the defendant's solicitors briefly responded that the email was issued to inform the arbitral tribunal of the circumstances leading up to the filing of the application in the court and that it was not the defendant's intention to engage in a legal discourse. The defendant's solicitors further clarified that:

> Be that as it may, we do not wish to engage in litigation by correspondence *and are prepared to deal with the said application in the High Court of Kuala Lumpur*.

[23] Enclosure 1 containing the application is filed by the plaintiff pursuant to s 11(1) of the AA 2005 which states:

> 11 Arbitration agreement and interim measures by High Court
>
> (1) *A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —*
>
> (a) maintain or restore the status quo pending the determination of the dispute;
>
> (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (e) *provide security for the costs of the dispute*. (Emphasis added.)

[24] No application was filed before the arbitral tribunal by the plaintiff for security for costs against the defendant under s 19(1) of the AA 2005 which provides:

> 19 Power of arbitral tribunal to order interim measures
>
> (1) *Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures*.
>
> (a) [Deleted by Act A1569]
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) [Deleted by Act A1569]
>
> (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to —

(a) maintain or restore the status quo pending the determination of the dispute; A

(b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; B

(d) preserve evidence that may be relevant and material to the resolution of the dispute; or

(e) *provide security for the costs of the dispute*. C

[25] Subsequent to the filing of encl 1, the parties proceeded to file and exchanged their respective affidavits and written submissions. No objections were raised in any of the affidavits or in the written submissions that the application for the security for costs ought to be brought before the arbitral tribunal instead of the court. Enclosure 1 was then set for hearing on 17 August 2022. D

[26] On the date fixed for the hearing of encl 1, I asked counsel for both the plaintiff and defendant to address the court as to whether encl 1 should rightly be filed before the arbitral tribunal and heard by the arbitral tribunal instead. This is because our courts recognise the principles of party autonomy and minimal court intervention of arbitration proceedings which are incorporated in our AA 2005 which adopts the UNCITRAL Model Law. Where the parties have contractually resorted to arbitration as their dispute resolution forum, the court is slow to interfere. The court's role is merely to facilitate and support the arbitration proceedings. E F

[27] The issue that I raised with counsel revolves around the application of s 11(1) and s 19(1) of the AA 2005 which I have set out above. On the plain reading of these sections, the court and the arbitral tribunal appear to possess concurrent jurisdiction to grant interim measures. However, it is unclear under what circumstances would it be appropriate for parties to apply to the court for the grant of interim measures without being looked upon as usurping the functions of the arbitral tribunal or pre-empting its decision. Is a party completely free to seek interim reliefs from either the court or the arbitral tribunal without any pre-conditions? G H

[28] Both counsel for the plaintiff and defendant were directed to file their respective further or supplemental written submissions to address the court on the issue and the hearing of encl 1 was then adjourned to 25 August 2022. I

[29] After hearing oral submissions from counsel and considering their

respective further written submissions, I dismissed encl 1 and the application without hearing the merits. I set out the parties' respective contentions and my grounds below.

THE PLAINTIFF'S CASE

[30] Learned counsel for the plaintiff submitted that the court and the arbitral tribunal have co-extensive or concurrent jurisdiction to grant interim measures in relation to the arbitration proceedings. The court's jurisdiction is provided for under s 11(1) of the AA 2005 whereas the arbitral tribunal's jurisdiction is stated in s 19(1) of the same.

[31] Based on a literal reading of the two sections, learned counsel for the plaintiff contended that there is no requirement imposed on a party such that an application for interim measures must first be made before the arbitral tribunal. In other words, the court's jurisdiction to grant interim measures under our AA 2005 is not subsidiary to that of the arbitral tribunal. Parties have complete freedom of choice to apply to whichever body they so wish.

[32] Learned counsel for the plaintiff argued that s 19 of the AA 2005 does not state that an application for security for costs 'must' or 'shall' be filed before the arbitral tribunal. In fact, it provides that the arbitral tribunal 'may' at the request of a party grants interim measures.

[33] Learned counsel for the plaintiff cited a line of case laws to support the contention that the word 'may' is to be construed as being 'directory' in nature especially when the relevant provisions are concerned with the procedural aspects of a statutory provision. Based on the aforesaid, it was contended that a party to the arbitration proceedings is free to choose the courts as the forum to grant the interim measures.

[34] Learned counsel for the plaintiff also drew a comparison between s 11(1) of our AA 2005 and s 12A of the Singapore International Arbitration Act 1994 ('the SIAA 1994'). Specifically, s 12A of the SIAA 1994, in particular, sub-ss (4), (5) and (6) of the SIAA 1994 thereto, there are express statutory requirements stipulated which must be satisfied before any application for interim measures is made to the courts. In contrast, our s 11(1) and s 19(1) of the AA 2005 have no such equivalent provisions. Hence, learned counsel for the plaintiff submitted that in Malaysia, the party is afforded with a choice to either file the application for interim measures including for security for costs to the court or to the arbitral tribunal.

[35] Further, learned counsel for the plaintiff argued that it had by its second letter proposed to the defendant to refer the application for security for costs to

be heard before the arbitral tribunal. However, the defendant did not give a clear answer to the proposal. Thus, no agreement was concluded between the parties which means that the plaintiff is entitled under s 19(1) of the AA 2005 to proceed to seek the security for costs from the court. For this proposition, learned counsel for the plaintiff sought reliance on the case of *Measat Broadcast Network Systems Sdn Bhd v AV Asia Sdn Bhd* [2014] MLJU 1860; [2014] 3 CLJ 915 where at paras [46] and [47], the learned High Court judge held thus:

> [46] The relevant provision for interim measures under the KLRCA rules is r 26. It makes no express provision for the grant of security for costs. However, s 19 of the Arbitration Act 2005 provides that unless the parties agree otherwise, a party may apply to the arbitral tribunal for, inter alia, security for costs. Section 19(2) provides that the arbitral tribunal may require any party to provide appropriate security in connection with such measure as ordered under sub-s (1).
>
> [47] *In the instant case it is not in dispute that Measat wrote to AV Asia seeking to have the arbitral tribunal determine an application for security for costs. AV Asia however did not consent to Measat's proposal. The net effect is that no agreement or consensus could be achieved between the parties for the arbitral tribunal to determine this issue of security for costs. Measat therefore applied to court for this relief.*

[36] Learned counsel for the plaintiff also submitted that in any event, even if the condition in s 19(1) of the AA 2005 has not been satisfied, the defendant is nevertheless, procedurally estopped from objecting to the court's jurisdiction to hear the application as the defendant has raised *no* objection to the choice of forum in any of their affidavits filed in opposing the application. Neither did the defendant raise any such objection in its written submissions filed in this court.

[37] Thus, the plaintiff's case can be boiled down into three grounds, each of which stands independently:

(a) the court has concurrent/co-extensive jurisdiction and parties have complete freedom of choice to choose its preferred forum;

(b) the non-consent by the defendant to its request to bring the application before the arbitral tribunal means that the plaintiff can now file the application to the court as the parties have 'otherwise agreed' under s 19(1) of the AA 2005; and

(c) the defendant's is estopped from objecting to the court's jurisdiction to hear the application in encl 1 for failing to raise any objections.

THE DEFENDANT'S CASE

[38] Learned counsel for the defendant on the other hand submitted that there was no agreement reached under s 19(1) of the AA 2005 between the

defendant and the plaintiff. Thus, the default position stipulated in s 19(1) of the AA 2005 should continue to apply, namely, the application should be made to the arbitral tribunal. It is contended that applications for interim measures can only be made to the court in appropriate circumstances as held in two High Court decisions.

[39] In both *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action* [2010] MLJU 2140, and *Jiwa Harmoni Offshore Sdn Bhd v ISHI Poawer Sdn Bhd* [2009] 1 LNS 849, it was held that where there is a concurrent jurisdiction between the arbitral tribunal and the High Court to grant interim measures, the application should first be made to arbitral tribunal. In particular, His Lordship Mohamad Ariff J (as he then was) had referred to some instances where the court may intervene at para [14] of his judgment in *Cobrain Holdings Sdn Bhd*:

> [14] Thus there is a clear overlap between s 11(1) (a), (b), (c) and (f) with s 19(1) (a), (b), (c) and (d). Going by the basic principles as stated earlier, where there is a concurrent jurisdiction, a party should first apply before the arbitral tribunal, unless there are countervailing factors, since the role of the High Court is to 'support arbitration': (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR (R), a Singapore Court of Appeal decision). *NCC International AB* has usefully specified some instances where the court of law may intervene, namely where third parties, over whom the arbitral tribunal has no jurisdiction, are involved, where matters are very urgent or where the court's coercive powers of enforcement are required.

[40] Learned counsel for the defendant also submitted that because the court's power to grant interim measures is a statutory power, the requirement of the statute must be strictly complied with before the power can be invoked. In this regard, the court must take cognisance of the provisions of minimal intervention by the courts in arbitration proceedings as stipulated in s 8 of the AA 2005 which specifies:

> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

[41] Finally, on the issue of estoppel, it is contended that there can be no estoppel against the statute. It is said that estoppel being an equitable principle cannot operate to defeat clear statutory provisions of law. This was adopted in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b where His Lordship Edgar Joseph Jr ruled that: 'The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute ... particular when the non-compliance goes to the root of the thing'. The same principle was reiterated by the Federal Court in *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1.

THE COURT'S ANALYSIS

[42] The power of the arbitral tribunal to grant interim reliefs is determined by the parties either expressly in the arbitration agreement or by the choice of the institutional rules which allow the arbitral tribunal to grant interim measures. Such power may also be provided for by the applicable arbitration law governing the arbitration.

[43] In Malaysia, our s 19(1) of the AA 2005 provides the power for the arbitral tribunal to grant interim measures if requested for by a party to the arbitration 'unless otherwise agreed by the parties'. By this I take it to mean that parties to the arbitration can agree to *exclude* the jurisdiction of the arbitral tribunal to grant interim measures and instead leaving it exclusively to the courts to order such measures. For convenience, I would refer to such agreement as 'exclusion agreement'.

[44] This means that under our AA 2005, if there is *no* exclusion agreement, both the arbitral tribunal and the court will have concurrent jurisdiction to grant interim measures in respect of the arbitration proceedings.

[45] Although it is not explicit in our AA 2005, particularly under ss 11(1) and 19(1) thereto, that relegates the role of the court in granting interim measures to that of a subsidiary or supporting role, it is my judgment that in the exercise of the concurrent jurisdiction, it will be wholly inconsistent with the fundamental principles of party autonomy and minimal judicial intervention if the court were to adopt a 'complete freedom of choice' approach as canvassed by learned counsel for the plaintiff.

[46] Section 8 of the AA 2005 reads:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[47] The aforesaid section is our Parliament's adoption of the principle of minimum judicial intervention in arbitration following article 5 of the UNCITRAL Model Law. It restricts the courts' role only to such matters as are expressly and specifically provided in the AA 2005. Party autonomy is given precedence over court intervention in arbitration.

[48] Based on the aforesaid principle, it is only natural that when parties agreed to have their disputes to be determined by an arbitral tribunal, all applications including application seeking interim measures relating to their disputes ought to be made before the said tribunal. This necessarily imposes limitations to the parties' choice of forum on matters pertaining to their

disputes. It seems to me incongruous that a party, who on the one hand, has agreed to the arbitral tribunal's jurisdiction to determine the disputes including the granting of interim measures, to nevertheless, be at liberty on the other hand to prefer his application for interim measures to be determined by the courts. To my mind this is inconsistent with the principle of party autonomy that underlies the AA 2005.

[49] Thus, even though the arbitral tribunal is not the only forum that is empowered to grant interim measures in connection with the arbitral proceedings because the AA 2005 confers on the court concurrent jurisdiction to entertain and grant interim measures as well, it does not mean that a party has a free choice to file the application for interim measures in either the courts or before the arbitral tribunal. Quite apart from the obvious potential conflicts that may arise with both the court and the arbitral tribunal having concurrent jurisdiction, there is also the need to coordinate the powers and competences of the court and the arbitral tribunal in the exercise of the jurisdiction in order to avoid any abuse of procedure. This is best avoided by requiring a party seeking interim measures to first resort to the arbitral tribunal and only subsidiarily to the court.

[50] It is true that ss 11(1) and 19(1) of the AA 2005 do not state that an application for interim measures has to be first made to the arbitral tribunal. Neither do these provisions state that a party is not permitted to file the application to *both* the court and the arbitral tribunal. A wide and liberal interpretation of these provisions would permit a party to first file an application before the court and thereafter, if the decision is not in his favour, to file a similar application before the arbitral tribunal. Quite clearly, this cannot be the intended purpose of Parliament giving concurrent jurisdiction to the court and the arbitral tribunal.

[51] The sections must be approached in a manner that is consistent with the court's role in arbitration proceedings under the UNICITRAL Model Law which is to facilitate, support and aid the arbitral tribunal to ensure that the award of the arbitral tribunal will not be rendered impotent and or unenforceable. Following from the principles of party autonomy, the court should respect the parties' choice and assume a subsidiary role and refrain from entertaining and granting any application for interim measures which should first be made before the arbitral tribunal save for certain exceptional circumstances.

[52] Accordingly, I echo the sentiment of Justice Mohamad Ariff Md Yusof (as he then was) in the case of *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action* [2010] MLJU 2140 where His Lordship held that when the interim measure is the one that both the court and arbitral tribunal

have jurisdiction to grant, a party should first apply before the arbitral tribunal. Further, the court will only entertain and grant interim measures in exceptional circumstances, to wit, where:

(a) the interim measure is sought against a third party whom the arbitral tribunal has no jurisdiction;

(b) the matters are very urgent; or

(c) the High Court's coercive powers of enforcement are needed; and

(d) the arbitral tribunal has not been constituted.

[53] In fact, this was similarly held in *Jiwa Harmoni Offshore Sdn Bhd v ISHI Poawer Sdn Bhd* [2009] 1 LNS 849, where Hamid Sultan Abu Backer JC (as he then was) held as follows:

> The powers granted to court pursuant to s 11 are powers which are not meant to be oppressively invoked by a party to arbitration proceedings. It must be exercised with utmost care and circumspection to ensure and support the arbitration mechanism and not do any act which will stifle the arbitral process. In addition, when such powers are also vested with the arbitrator, the application must first be made before the arbitrator ...

[54] It is true that unlike our s 11(1) of AA 2005, ss 12A(4), (5) and (6) of the SIAA 1994 expressly limit the High Court's role in granting interim measures to one that is subsidiary or supplemental to the arbitral tribunal. The relevant provisions are as follows:

> 12A Court-ordered interim measures
>
> (1) This section is to apply in relation to an arbitration —
>
> (a) to which this Part applies; and
>
> (b) irrespective of whether the place of arbitration is in the territory of Singapore.
>
> (2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the General Division of the High Court has the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (j) as it has for the purpose of and in relation to an action or a matter in the court.
>
> (3) The General Division of the High Court may refuse to make an order under subsection (2) if, in the opinion of the General Division of the High Court, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make the order.
>
> (4) *If the case is one of urgency, the General Division of the High Court may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the General Division of the High Court thinks necessary for the purpose of preserving evidence or assets.*

(5) *If the case is not one of urgency, the General Division of the High Court is to make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.*

(6) *In every case, the General Division of the High Court is to make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.*

(7) An order made by the General Division of the High Court under subsection (2) ceases to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2). (Emphasis added.)

[55] As can be appreciated above, the ss 12A(4), (5) and (6) of the SIAA 1994 provide that the High Court's power to grant interim measures only arises when:

(a) the case is one of urgency necessary for the purpose of preserve evidence or assets;

(b) where there is no urgency, the application is made with the permission of the arbitral tribunal or with the agreement in writing of the other party; and

(c) the arbitral tribunal has no power or is unable for the time being to act effectively.

[56] However, it should be noted that s 12A of SIAA 1994 was only inserted on 1 January 2010 by their Act 26 of 2009. The High Court's power to grant interim measures prior to the amendment was governed by s 12(7) of SIAA 1994. The section reads:

12 Powers of arbitral tribunal

(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(f) the preservation and interim custody of any evidence for the purposes of the proceedings; A

(g) securing the amount in dispute;

(h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and B

(i) an interim injunction or any other interim measure.

(7) *The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court*. (Emphasis added.) C

[57] The wordings in said pre-deleted s 12(7) of SIAA 1994 are substantially the same as s 11(1) of our AA 2005 in which no express limitation is placed on the court in exercising its power to grant interim measures. The court can grant interim measures just like the arbitral tribunal. There was similarly a clear overlapping jurisdiction between the court and arbitral tribunal in granting interim measures. D

[58] Even prior to the insertion of the new s 12A, the Singapore Court of Appeal had resolved this issue of overlapping jurisdiction in the pre-deleted s 12(7) in the case of *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5. The Singapore Court of Appeal, after tracing back the drafting history of ss 12(1) and 12(7) of SIAA 1994 as well as the UNCITRAL Model Law Commentary eventually stated that: E F

[39] The Model Law Commentary ([22]) explains (at 115) the rationale for retaining the court's jurisdiction over interim measures as follows:

> *The main reason is that the availability of [interim measures of protection from a court] is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results.* G

[40] This shows that, consistent with our interpretation of ss 12(1) and 12(7) of the IAA, *parties ought not to be allowed to bypass seeking interim measures from an arbitral tribunal merely because curial assistance is conceivably available. Rather, help from the court is to be sought only when arbitration is inappropriate, ineffective or incapable of securing the particular form of relief sought*. H

[41] In summary, under the IAA regime, *although the court has concurrent jurisdiction with the arbitral tribunal to order interim measures, the court will nevertheless scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings.* We concur with the view expressed in Leslie K H Chew, *Singapore Arbitration Handbook* (LexisNexis, 2003) at p 105 that: I

> [Section 12(7) read with s 12(1) of the IAA] merely provides an alternative for the parties to apply to the High Court if applications for interlocutory relief may

A not be conveniently made to the tribunal or if it is more expedient to do so in court.

Examples of such situations include those where third parties over whom the arbitral tribunal has no jurisdiction are involved, where matters are very urgent or where the court's coercive powers of enforcement are required (see David St John Sutton & Judith Gill, *Russell on Arbitration* (Sweet & Maxwell Limited, 22nd Ed, 2003) at para 7–138). (Emphasis added.)

[59] Thus, even though the present ss 12A(4), (5) and (6) of the SIAA 1994 seem to suggest that the supplemental role of the Singapore High Court in arbitration proceedings was expressly introduced through the insertion of the said sections, the truth is that the Singapore courts had, prior to the said sections already adopted the position that the parties to arbitration agreement ought not to resort to the courts for interim measures without first applying before the arbitral tribunal.

[60] In fact, s 12(6) of the old UK Arbitration Act 1950 also bears a similar structure as s 11(1) of the AA 2005 and s 12(7) of SIAA 1994. The English Court was vested with the same powers as the arbitral tribunal to grant interim measures. The House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, applying s 12(6) of the Act held that:

> There is always a tension between when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, *on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail.* The court has stayed the action so that ... the arbitrators can decide whether to order a final mandatory injunction. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide. (Emphasis added.)

[61] The case of *Channel Tunnel* was in fact referred to by both our courts in *Cobrain Holdings* and *Jiwa Harmoni*.

[62] Learned counsel for the plaintiff also contended that the use of the word 'may' in both s 11(1) and s 19(1) of AA 2005 means that Parliament had intended to leave the decision to the party on the choice of the forum to seek the interim measures. This is because the word 'may' ought to be construed as directory and not mandatory. In this regard, learned counsel for the plaintiff cited four authorities, namely, *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; *Perbadanan Kemajuan Kraftangan Malaysia v*

DW Margaret a/p David Wilson (t/a Kreatif Kraf) [2010] 2 MLJ 713; *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23 and *Regina v Secretary of State for the Home Department, Ex Parte Jeyeanthan; Ravichandran v Secretary of State for The Home Department* [2000] 1 WLR 354.

[63] With respect, none of these authorities deals with the AA 2005. It is unwise to adopt the interpretation of unrelated provisions in other statutes to the present case. None of these authorities deal with concurrent jurisdiction between the arbitral tribunal and the court.

[64] Thus, with respect to learned counsel for the plaintiff, I disagree with the contention that a different standard ought to be adopted for the application of s 11(1) of the AA 2005 due to the generality of its provision as compared to s 12A of SIAA 1994 and or the use of the word 'may' in both ss 11(1) and 19(1) of the AA 2005.

[65] Learned counsel for the plaintiff submitted as an alternative argument that the peculiar facts in the present case is one that ought to be entertained by the court notwithstanding that no application has been made to the arbitral tribunal. It was contended that the circumstances of this case are such that this court would in fact be supporting and facilitating the arbitration proceedings in exercising its jurisdiction to grant the interim measure sought.

[66] In support, reference was made to the case of *P&A Management Sdn Bhd v WSH Development Sdn Bhd* [2022] MLJU 825, where the learned High Court judge, whilst supporting the stance that the application for interim measure should first be made to the arbitral tribunal, nevertheless, justified bypassing the arbitral tribunal on the grounds that the respondent's conduct was unreasonably obstructive. Aliza Sulaiman J in para [29], stated that:

> *This court recognises that, in general, an application for interim measure should first be made to the arbitral tribunal.* However, this is not an inflexible rule especially since co-extensive powers have been expressly given to the arbitral tribunal and the courts. *In determining whether an exceptional case has been established by an applicant, the court must be vigilant in ensuring that a favorable decision for the applicant would support the arbitration mechanism and not restrain or suppress the arbitral process ...* (Emphasis added.)

[67] *P&A Management Sdn Bhd* also involved an application for the security of costs. The application was made to the High Court instead of the arbitral tribunal. In this case, the plaintiff has obtained an adjudication decision in its favour. The defendant, however, consistently obstructed the plaintiff from enforcing the adjudication decision. The High Court found that the plaintiff was justified in bypassing the arbitral tribunal on the grounds that the

defendant's conduct was unreasonably obstructive. The rationale is that if the arbitral tribunal awards the security of costs, there is a high risk that the defendant will again obstruct the enforcement of the award. This, in turn, would delay or prolong the arbitration process.

[68] However, unlike *P&A Management Sdn Bhd*, the plaintiff in the present case has not demonstrated that the defendant is being unreasonably obstructive such that the insistence for the matter be heard before the arbitral tribunal would delay the arbitration process. Thus, the case of *P&A Management Sdn Bhd* is of no help to the plaintiff's position.

[69] The plaintiff further submitted that if this court were to remit or direct the application to be heard before the arbitral tribunal, it would be: (i) prejudicial to the plaintiff; (ii) unjust; (iii) not consonant with the proper, efficient and fair administration of justice; (iv) stifling the arbitration process; (v) amounting to denial of access to justice; and (v) increasing litigation costs. This is because substantial time has been spent in preparing and filing the necessary cause papers for the application and the evidential hearings for the arbitration are scheduled to commence in two months' time. To compel the plaintiff to re-start the entire process of applying for security for costs to the arbitral tribunal will not only incur extra costs but may also result in the adjournment to the evidential hearings. Furthermore, the defendant has had the benefit of the submissions filed by the plaintiff. All these would go counter to the principle of supporting the arbitral process for which this courts stands firmly on.

[70] With respect, these 'issues' that learned counsel for the plaintiff raised can be easily resolved by ordering the parties to file all the existing cause papers filed in this court to be placed before the arbitral tribunal as proposed by learned counsel for the defendant. The arbitral tribunal can then decide on the application based on the available cause papers including the written submissions. There is no reason why the determination of the application cannot be made by the arbitral tribunal expeditiously. Indeed, the arbitral tribunal is better placed to consider the application being more familiar with the background facts and issues of the disputes.

[71] As a further ground to persuade this court to hear and grant the application for security for costs, the plaintiff contended that in the defendant's second reply, the defendant's solicitor did not state in clear and express terms that it agreed to the application being filed before the arbitral tribunal. In fact, all the defendant's solicitor did was to provide an ambiguous reply seeking to obfuscate the issue. Learned counsel for the plaintiff contended that the response could only be understood as the defendant *not* consenting to the application to be made and determined by the arbitral tribunal.

[72] The aforesaid is of course based on the conclusion reached by Her Ladyship Nalini Pathmanathan J (now FCJ) in *Measat Broadcast Network Systems Sdn Bhd* which has been alluded to above.

[73] In that case, the High Court appears to have justified its intervention to grant the plaintiff security for costs on the ground that no agreement or consensus could be achieved between the parties for the arbitral tribunal to determine the issue for security for costs. It indirectly established that by reason of the defendant's non-consent towards the arbitral tribunal's jurisdiction, this amounts to consent towards the High Court's jurisdiction.

[74] With respect, I do not think that simply because the defendant had not provided express consent to have the arbitral tribunal determined the application, this itself can be equated to mean that there *is* an agreement by the parties to exclude the jurisdiction of the arbitral tribunal and for the plaintiff to apply to court for the security for costs. Put it in another way, the *non-agreement* between the parties cannot amount to the existence of an excluded agreement under s 19(1) of the AA 2005.

[75] A plain reading of s 19(1) of the AA 2005 would justify my departure from the conclusion reached in *Measat Broadcast Network Systems Sdn Bhd*. Section 19(1) of the AA 2005 reads:

> *Unless otherwise agreed by the parties*, the arbitral tribunal may, *at the request of a party*, grant interim measures.

[76] Section 19(1) of the AA 2005 opens with the party autonomy statement — 'Unless otherwise agreed by the parties'. It grants maximum freedom to the parties to agree to decide whether to exclude the arbitral tribunal's jurisdiction to grant interim measures. The parties may by agreement decide not to grant jurisdiction to the arbitral tribunal to grant interim measures. Absence such an agreement, s 19(1) stipulates that the arbitral tribunal will have the jurisdiction to grant interim measures once a request is made by a party to the arbitration proceedings. In other words, by default, either party may apply to the arbitral tribunal for interim measures. *The party is not duty-bound or legally obliged to ask for consent from the other party before he can make the application.*

[77] The aforesaid means that there is in law no requirement for any party to seek the consent from the other party before an application is made to the arbitral tribunal for interim measures. It follows that even when consent is sought from the other party to bring an application for interim measures before the arbitral tribunal and such consent is either rejected or not responded to, it does not deprive the requesting party to make the application for interim measures from the arbitral tribunal at all. Put simply, the jurisdiction of the arbitral tribunal to order interim measures is not excluded in such a case.

[78] The phrase '[U]nless otherwise agreed by the parties' in s 19(1) means that the parties to the arbitration proceedings must reach a *consensus ad idem* or a positive agreement that the application for interim measures for the arbitration proceedings would be made to the courts instead of the arbitral tribunal. The parties must enter into an exclusion agreement. A rejection or dismissal of a request from a party seeking consent to an application being made to the arbitral tribunal does not give rise to an exclusion agreement.

[79] Premised on the reasoning above, it is my judgment that there was no agreement in this case between the plaintiff and the defendant for the application to be brought for determination to the court instead of to the arbitral tribunal.

[80] Finally, learned counsel for the plaintiff contended that the defendant is estopped by its conduct from submitting that the court has no jurisdiction to entertain and grant the application. More specifically, the relevant conduct of the defendant relied upon in support of the plaintiff's contention are as follows:

(a) at no time during case management since the filing of the application on 1 April 2022 till the day of hearing did the defendant raise any jurisdictional objection and or any preliminary objection that the application ought to be made before the arbitral tribunal;

(b) at no time in any of the averments contained in the affidavits affirmed where the defendant had raised jurisdictional objection and or any preliminary objection that the application ought to be made before the arbitral tribunal and or that s 11(1) of the AA 2005 has not been properly invoked by the plaintiff; and

(c) at no time in the defendant's written submission dated 20 June 2022 ('encl 7') and the defendant's written submission in reply dated 29 July 2022 ('encl 16') did the defendant raise a jurisdictional objection and/or any preliminary objection that the application ought to be made before the arbitral tribunal and or that s 11(1) of the AA 2005 had not been properly invoked by the plaintiff.

[81] Accordingly, learned counsel for the plaintiff' contended that the defendant has, by its conduct, made a concerted decision, acceded to and therefore elected to have the application heard before this court under s 11(1) of AA 2005. The defendant, having elected to adopt such an approach and given the co-extensive jurisdiction available, is thus estopped from objecting to this court's jurisdiction to hear the application due to their non-objection.

[82] Learned counsel for the plaintiff referred to the case of *Cowlin Construction Ltd v CFW Architects (A Firm)* [2002] EWHC 2914 (TCC) where Justice Frances Kirkham decided that the adjudicator appointed has

jurisdiction to hear the matter on the ground that the defendant had not objected or challenged his jurisdiction at the earliest possible opportunity. A

[83] It is also contended that the defendant cannot be permitted to blow hot and cold, that is, on the one hand not consenting to the plaintiff's request to make the application before the arbitral tribunal and not raising any objection to the proceedings filed before this court, and on the other hand seeking presently to insist that party autonomy and minimal intervention from the court must be adhered to for the application. It is said that the defendant had two inconsistent rights as opposed to having a choice between two alternative remedies and with an open mind and with full knowledge, the defendant had done an unequivocal act showing that he had chosen one and thus cannot afterwards pursue the other (see *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752 at p 779; *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761 at p 791; [2012] 2 CLJ 16 at p 50; *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376). B C D

[84] With respect, the issue before this court relates to the resolution of the tension between the arbitral tribunal and the court arising from the concurrent jurisdiction vested in both bodies to order interim measures in relation to an arbitration proceedings. What requires determination is the correct approach that is to be taken by the court when confronted with an application for interim measures by a party to an arbitration proceedings where the arbitral tribunal has the power or is able to act effectively to also grant such interim orders. E F

[85] To my mind, the court in determining the aforesaid matter is and cannot be affected by any issue of estoppel that may be raised *between* the parties especially since in the present case, it is not the jurisdiction of the court that is put in dispute but the exercise of the court's discretion. G

[86] Hence, the issue of estoppel raised by the plaintiff against the defendant for taking an inconsistent step in this proceeding has no bearing on the court's exercise of its discretion to refrain from intervening in the arbitral process and not to take out of the hands of the arbitrators the power of decision which the parties have entrusted to them alone. The estoppel between the parties cannot be applied to tie the hands of the court resulting in the court encroaching on the arbitral tribunal's jurisdiction, which is inconsistent with the underlying policy of the AA 2005. H I

[87] Accordingly, the plaintiff's application vide encl 1 is dismissed and the parties are hereby directed to forthwith re-file all cause papers including all the written submissions filed herein before the arbitral tribunal. The arbitral

A tribunal is of course at liberty to give further directions for the hearing of the application and to determine the issue of costs in respect of the same.

Application dismissed.

B Reported by Nabilah Syahida Abdullah Salleh

C

D

E

F

G

H

I